

# **The *Kelo* Blowback: How the Newly-Enacted Eminent Domain Statutes and Past Blight Statutes Are a Maginot Line-Defense Mechanism for All Non-Affluent and Minority Property Owners**

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“Government is instituted to protect property. . . . This being the end of government.” ~James Madison<sup>1</sup>

*The states' reactions to Kelo v. City of New London served as a fierce rebuke of the Supreme Court's broad interpretation of the Fifth Amendment's "public use" clause. States quickly passed laws and moratoria barring any governmental takings of private property for the sake of economic development, unless that property is blighted. At first blush, this reaction is reasonable. However, after examining all of the States' statutes defining "blight," it is clear that these definitions are all extremely malleable and, in fact, so flexible that most properties could be designated as blighted. Therefore, even after these States passed new laws, there still remains little protection for property owners, especially low-income and minority homeowners. This Note examines the blight definitions throughout the United States and demonstrates how the definition has been abused by local governments. Moreover, the Note proposes a blight definition that would bar local governments from abusing the definition of blight when trying to take property for the sake of private development.*

## **I. INTRODUCTION**

Property owners as a group had a rough 2005. They witnessed hurricanes, floods, earthquakes, mudslides, and fires devastate their homes and businesses.<sup>2</sup> Although in many cases these tragedies were not foreseen,

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<sup>1</sup> James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 266 (Robert A. Rutland et al. eds., 1983).

<sup>2</sup> Joseph B. Treaster and N.R. Kleinfeld, *New Orleans Is Inundated as 2 Levees Fail; Much of Gulf Coast Is Crippled; Toll Rises*, N.Y. TIMES, Aug. 31, 2005, at A1

these natural disasters were hardly unheard of and thus not too surprising. One problem that these property owners did not expect was the Supreme Court's ruling in *Kelo v. City of New London*, handed down on June 23, 2005.<sup>3</sup> To these property owners, their government had betrayed them by authorizing governments to take their own homes and businesses and transfer that very same property to private developers under the guise of "economic development."<sup>4</sup> Following a strong public reaction after *Kelo*,<sup>5</sup> state legislatures began to enact new laws to tighten the restrictions against such abuses.<sup>6</sup> This response has, to some extent, quelled the fears of citizens.<sup>7</sup> These new statutes, however, the supposed remedy to property owners' fears,<sup>8</sup> effectively act as a modern-day Maginot Line—just as on those fateful

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(describing Hurricane Katrina's destruction of Mississippi and Louisiana); Nick Madigan and Chris Dixon, *An Avalanche of Mud, Panic and a Race for Life as Homes Tumble*, N.Y. TIMES, June 2, 2005, at A12 (reporting the property devastation caused by the mudslides in California); John M. Broder, *Ferocious Heat Maintains Grip Across the West*, N.Y. TIMES, July 23, 2005, at A1 ("[I]n Arizona, firefighters are struggling to contain a swarm of 20 wildfires around the state.").

<sup>3</sup> *Kelo v. City of New London*, 125 S. Ct. 2655, 2668 (2005) (holding that the Fifth Amendment's public use requirement is satisfied when local governments take private property for the sake of economic development).

<sup>4</sup> *Id.* at 2665 ("Because that plan [to take private property for the sake of economic development] unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.").

<sup>5</sup> Judy Coleman, *The Powers of a Few, the Anger of the Many*, WASH. POST, Oct. 9, 2005, at B2 (describing citizens' rage that fumed once they heard about the *Kelo* decision: "*Kelo* incited a hostile reaction").

<sup>6</sup> T.R. Reid, *Missouri Condemnation No Longer So Imminent: Supreme Court Ruling Ignites Political Backlash*, WASH. POST, Sept. 6, 2005, at A2; Barrie Tabin Berger, *State, Federal Lawmakers Moving to Curb Eminent Domain Powers: The Supreme Court's June Ruling that Local Governments Can Use Their Power of Eminent Domain for the Purpose of Economic Development Has Unleashed a Legislative Backlash From State and Federal Lawmakers, Both Republican and Democrat*, GOV'T FIN. REV., Oct. 1, 2005, at 54 (describing recently enacted or proposed state bills that are meant to prohibit the use of eminent domain for the sake of private development purposes in Alabama, Delaware, Illinois, Michigan, Minnesota, New Jersey, New York, Ohio, Oregon, Pennsylvania, Texas, and Virginia); John R. Nolon and Jessica A. Bacher, *Fallout From 'Kelo': Ruling Spurs Legislative Proposals to Limit Takings*, N.Y. L.J., Oct. 19, 2005, at 5 (explaining that state legislature's response to the *Kelo* decision was to propose Senate Bill 5936 which was a statute that strictly limited the use of eminent domain by local governments to properties designated as blighted areas).

<sup>7</sup> Editorial, *This Is Blight? Our Position: Daytona Property Shows Why Eminent Domain Needs To Be Tighter*, ORLANDO SENTINEL, Feb. 5, 2006, at A24 [hereinafter *Blight*] (explaining how Florida's new statute is not as effective as it needs to be and citizens should not be satisfied that the problem is fixed).

<sup>8</sup> See, e.g., Gary Andres, Op-Ed., *The Kelo Backlash*, WASH. TIMES, Aug. 29, 2005, at A21; *Hands Off Our Homes*, ECONOMIST, Aug. 20, 2005, at 21.

days at the beginning of World War II when the French citizens believed that the Maginot Line protected them from a German invasion,<sup>9</sup> the property owners now similarly rest their heads comfortably at night believing that their homes are now immune from the government's takings powers. Likewise, just as the French were oblivious to the Germans circumventing the Maginot Line by crossing through the Netherlands to invade their country,<sup>10</sup> these citizens are unaware of the truth: that government still has the same amount of power—albeit from another source of law—to take their homes; only instead of “[u]nder the banner of economic development”<sup>11</sup> it is under the guise of blight.

These state statutes have propped a door wide open for private developers and government officials to take property under the banner of blight.<sup>12</sup> Pursuant to these recently enacted state statutes, as long as the governmental officials can reasonably designate a property as blighted, then that governmental entity may still condemn such property and give the land to another private individual.<sup>13</sup> The method conducted by these officials is relatively easy to accomplish for two basic reasons. First, the courts provide government officials with great deference in designating blight.<sup>14</sup> Second, the definition of blight is extremely vague and malleable.<sup>15</sup> For these reasons, a court is hard-pressed to find that the government official designating blight has abused his discretion.<sup>16</sup> Therefore, what property owners have not

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<sup>9</sup> CHRIS BISHOP, *THE RISE OF HITLER'S THIRD REICH: GERMANY'S VICTORY IN EUROPE, 1939–42*, at 33 (2004).

<sup>10</sup> *Id.*

<sup>11</sup> *Kelo v. City of New London*, 125 S. Ct. 2655, 2671 (2005) (O'Connor, J., dissenting) (warning that “all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded”).

<sup>12</sup> See, e.g., ALASKA STAT. § 18.55.950 (2004).

<sup>13</sup> See, e.g., *Eminent Domain—Moratorium—Legislative Task Force*, 2005 Ohio Legis. Bull. L-2338 (West) (placing a moratorium on all takings of unblighted private property, without the owner's consent, where the primary purpose is for economic development and the property is to be transferred to another individual).

<sup>14</sup> Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. REV. 49, 50 (1999) (demonstrating the deference given to local officials in designating blighted properties).

<sup>15</sup> See Christopher S. Brown, Comment, *Blinded by the Blight: A Search for a Workable Definition of “Blight” in Ohio*, 73 U. CIN. L. REV. 207, 208 (2004) (“For Ohio, the very broad and often murky definition of blight is such a malleable term of art that blight is whatever the local government or redevelopment agency wants it to be.”); see, e.g., ALASKA STAT. § 18.55.950 (2004).

<sup>16</sup> Jennifer J. Kruckeberg, Note, *Can Government Buy Everything?: The Takings Clause and the Erosion of the “Public Use” Requirement*, 87 MINN. L. REV. 543, 548 (2002) (“While seemingly well intentioned, blight determinations are subjective and thus vulnerable to abuse.”).

realized yet is that the states, despite these new statutes enacted to curb eminent domain, still have the capability to take their property.

Because governments have retained their blight-designation powers, they may still specifically do what the recently enacted state statutes tried to prevent—take the homes of low-income households and replace them with private developments.<sup>17</sup> This result has unjustly and disparately affected blacks over whites,<sup>18</sup> the poor over the rich,<sup>19</sup> and those with little political representation over those that are politically-connected.<sup>20</sup>

This Note proposes that the necessary remedy to sufficiently curb such eminent domain abuse is to tighten the definition of blight. Practically all of the states' newly enacted and proposed eminent domain statutes depend on the definition of blight.<sup>21</sup> These state statutes, in general, preclude any taking of private property for private development unless the property is designated as blighted.<sup>22</sup> Consequently, these statutes ban such a taking as in *Kelo*. However, if a government official can designate a property as blighted, then the restriction in the new statute does not apply. The crux of the problem is that no state has a definition of blight that adequately prevents government officials from abusing its terms. The definition in each state is so malleable that blight can be whatever the local official wants it to be. In essence, no statutory definition of blight is narrow enough that it cannot be abused by local officials. Therefore, the supposed curb on eminent domain, as intended in these statutes, is not only ineffective, but also worse than the law was before the statute was enacted because now the citizens believe that their property is safe.

This Note addresses a problem that is extremely important not only in today's times, but for tomorrow as well. Property rights have always been held sacred under the Constitution. The loose definition of "blight" has allowed the government to advance unchecked upon this sacred

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<sup>17</sup> See, e.g., *City of Norwood v. Horney*, 161 Ohio App. 3d 316, 320 (2005) (condemnation of a neighborhood designated as blighted to allow for a multi-use development project).

<sup>18</sup> Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 DENV. U. L. REV. 1, 9 (2005) (describing modern redevelopment efforts as "Negro removal").

<sup>19</sup> *Id.* at 20 ("There is ample evidence that localities across the nation are using eminent domain to discourage poor residents [by taking their property] and to encourage the affluent" to move into the city.").

<sup>20</sup> *Id.* at 22 ("[T]he poor people in the community, most of whom are African American or Latino, don't have the [political] clout that the developers have.").

<sup>21</sup> Out of the four states that have already enacted their existing statutes, all of them hinge on the existence of blight.

<sup>22</sup> See, e.g., *Eminent Domain—Moratorium—Legislative Task Force*, 2005 Ohio Legis. Bull. L-2338 (West).

constitutional ground. The government's abuse of eminent domain, however, threatens fundamental rights even more basic than those protected by the Constitution.<sup>23</sup> Property rights are more significant than just where one lives or works: they are deemed sacred.<sup>24</sup> The Framers believed that property rights were closely related to the concept of liberty, and thus specifically constructed a government to protect their citizens' liberty.<sup>25</sup> Property rights are considered by leading economists as the key component of a capitalist economy.<sup>26</sup> Without the security and knowledge that the government will protect one's possessions, citizens have little incentive to work and save.<sup>27</sup> Moreover, transferring property from a middle-to-low income property holder to a wealthy and politically connected developer raises serious issues related to the public welfare in general.<sup>28</sup> Finally, concern over the loss of one's home and business cannot be covered by the "just compensation" requirement of the Fifth Amendment.<sup>29</sup> These events impact both the property owner and the community at large.<sup>30</sup>

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<sup>23</sup> Katherine M. McFarland, Note, *Privacy and Property: Two Sides of the Same Coin: The Mandate for Stricter Scrutiny for Government Uses of Eminent Domain*, 14 B.U. PUB. INT. L.J. 142, 151 (2004) ("The concern over the abuse of eminent domain is more than an argument about the importance of property rights.").

<sup>24</sup> Lazzarotti, *supra* note 14, at 50 ("[S]trong historical support exists for the rights of individuals, including the fundamental and sacred right of property" to restrict the government's frequent use of eminent domain.).

<sup>25</sup> Camarin Madigan, *Taking for Any Purpose?*, 9 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 179, 190 (2003) ("For many of the framers, property was intrinsically related to liberty: 'Property must be secured or liberty cannot exist.'" (citing JOHN ADAMS, *Discourse on Davila; A Series of Papers on Political History*, in 6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, 280 (Charles Francis Adams ed., 1851) (1790))).

<sup>26</sup> See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 6 (2000) (arguing that property rights are the key component of a capitalist economy).

<sup>27</sup> *Id.* at 6 (arguing that third-world countries' economies cannot grow because they lack adequate documentation of their property rights and there is no incentive to trade or use property as collateral).

<sup>28</sup> See McFarland, *supra* note 23, at 151 ("Condemnations for private gain are a public welfare issue."); Laura Mansnerus, *Eminent Domain's Pre-Eminence*, N.Y. TIMES, May 28, 2006, at 14NJ, Page 1. ("There's much to [sic] cozy a relationship between local officials and wealthy developers.") (quoting Assemblyman Michael Panter).

<sup>29</sup> See McFarland, *supra* note 23, at 151 ("Many property owners are personally attached to their property enough that no amount of money can make up for their loss . . ." However, because just compensation ignores the personal anguish and "lack[s] . . . accounting for the intangible emotional value of property" both of which impact a property owner, the owner of the condemned property cannot receive compensation beyond the bricks and mortar of his investment); David Lombino, *Owners Ousted From Times Site Awaiting Payout*, N.Y. SUN, Jan. 9, 2006, at 1 (describing that

This Note discusses how these proposed and recently enacted statutes are deeply flawed and what necessary changes must be undertaken to prevent such abuse under the government's taking power. Part II of this Note discusses the *Kelo* decision and the subsequent public and governmental reactions. Part III examines the current definitions of blight throughout the states. Part IV analyzes the great discretion bestowed on government officials and the result it has on property owners. It also discusses the benefits and drawbacks of the present arrangement. Part V provides instances where local governments have abused their discretion and taken land under the guise of blight. Finally, Part VI discusses what these new statutes must include and must remove in order to have an effective definition of blight. It also proposes a new definition of blight that will adequately protect property owners from such future takings.

## II. THE STATES' REACTION TO *KELO*

When the U.S. Supreme Court decided *Kelo*, it shocked both property owners and state representatives. Many believed that the Court had effectively removed the "public use" provision from the Fifth Amendment,<sup>31</sup> which through the Fourteenth Amendment<sup>32</sup> requires States to take property only for a public use.<sup>33</sup> In response to *Kelo*, property owners grew suspicious

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the businesses forced out of their Manhattan locations were successful before the taking. However, after the relocation of the businesses, all had problems making a profit because they were located at a less than ideal site and the compensation provided to them did not consider the loss in value of the second-best location for their business.).

<sup>30</sup> See McFarland, *supra* note 23, at 151 (Condemnation of large portions of property causes a "detrimental impact of eminent domain on the community as a whole").

<sup>31</sup> U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). It is somewhat surprising that *Kelo* caused such great shockwaves when the Court, just twenty years earlier, laid out the groundwork by stating that "it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be *palpably without reasonable foundation*.'" Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (emphasis added). In fact, many legal commentators had, before *Kelo*, openly regarded the "public use" requirement as merely a formality. See, e.g., Jennifer Maude Klemetsrud, *The Use of Eminent Domain for Economic Development*, 75 N.D. L. REV. 783, 783 (1999) ("[The] public use limitation is generally not a challenging obstacle, for most takings are declared by the courts to be for a public use.").

<sup>32</sup> See generally *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897).

<sup>33</sup> See, e.g., *Midkiff*, 467 U.S. at 241 ("[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.").

of state power and the state representatives decided to act to quell this fear.<sup>34</sup> As a result, States passed stricter eminent domain laws.<sup>35</sup>

In *Kelo*, the City of New London commenced proceedings to take property owned by several homeowners for the purpose of giving land to private developers.<sup>36</sup> The properties were located near the water and benefited from a scenic view of the Thames River and the Long Island Sound.<sup>37</sup> The City never alleged that any of these properties were blighted or in poor condition.<sup>38</sup> The City asserted that the taking of petitioners' lands served a public purpose. The private development was rationally related to the City's effort to revitalize the local economy by creating jobs, generating an increase in tax revenue, encouraging spin-off economic activities, and maximizing efficient use of the waterfront.<sup>39</sup> The property owners contended that the City of New London's taking violated the Fifth Amendment because the proposed economic development, caused by transferring property from a private citizen to another private entity, did not satisfy the "public use" provision of the Fifth Amendment.

In a 5–4 decision, the Court acknowledged that, while it is clear that a state may not take an individual's property for the sole purpose of transferring it to another, a State may transfer property from one private party to another as long as it serves a public purpose.<sup>40</sup> The Court also recognized

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<sup>34</sup> *Blight*, *supra* note 7, at A24.

<sup>35</sup> Timothy Sandefur, *The "Backlash" So Far: Will Citizens Get Meaningful Eminent Domain Reform?*, ALI-ABA COURSE OF STUDY MATERIALS: EMINENT DOMAIN AND LAND VALUATION LITIGATION 17 (2006) (Following the *Kelo* decision, "legislators in 38 states proposed more than 98 bills to limit the use of eminent domain at the state level"); *see, e.g.*, Eminent Domain–Moratorium–Legislative Task Force, 2005 Ohio Legis. Bull. L-2338 (West).

<sup>36</sup> *Kelo v. City of New London*, 125 S. Ct. 2655, 2659 (2005). Pfizer was the supposed beneficiary of the development.

<sup>37</sup> *Id.* The Court does not mention why the commercial development had to have a scenic view.

<sup>38</sup> *Id.* at 2664–65 ("Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area . . ."). *See infra* note 54 (discussing a Supreme Court case in which the condemned property is blighted).

<sup>39</sup> *Id.* at 2659. This Note does not attempt to dispel the rationality of a government's choice to encourage economic development.

<sup>40</sup> *Id.* at 2662 ("[W]hile many state courts in the mid-19<sup>th</sup> century endorsed 'use by the public' as the proper definition of public use, that narrow view steadily eroded over time. . . . [A]t the close of the 19<sup>th</sup> century, [the Court] embraced the broader and more natural interpretation of public use as 'public purpose.'"); *see also* *Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984) ("[The] Court long ago rejected any literal requirement that condemned property be put into use for the general public."); *Kruckeberg*, *supra* note 16, at 545 ("Traditionally, the power to acquire private land for

that its public use jurisprudence “has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”<sup>41</sup> In this capacity, the Court deferred to the City of New London’s decision that the area needed to be rejuvenated for the benefit of the community.<sup>42</sup> Therefore, the Court held it was permissible for the City of New London to transfer the condemned property to a private developer.<sup>43</sup>

The public reaction to this decision<sup>44</sup> was both hostile and incredulous.<sup>45</sup> Citizens and legal commentators were shocked that the Court could, in their eyes, remove the public use prong from the Takings Clause.<sup>46</sup> They

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parks, sewer systems, highways and roads, or hospitals for communal access by the general public was accepted to be necessary for an evolving society.”).

<sup>41</sup> *Kelo*, 125 S. Ct. at 2664; see also *Midkiff*, 467 U.S. at 242–43 (“When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.”).

<sup>42</sup> *Kelo*, 125 S. Ct. at 2665. As stated, *infra* note 117, courts generally give great deference to a government’s decisions.

<sup>43</sup> *Id.* But see the opinions of the dissenting Justices in *Kelo*. *Id.* at 2671. Justice O’Connor declared that “[u]nder the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded.” *Id.* (O’Connor, J., dissenting). She later warned that “[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.” *Id.* at 2676 (O’Connor, J., dissenting). Justice Thomas proposed a total reconsideration of the Public Use Clause and criticized the majority when he stated “[s]omething has gone seriously awry with this Court’s interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not.” *Id.* at 2685 (Thomas, J., dissenting).

<sup>44</sup> Lisa Brennan, *Redevelopment Condemnation Plans are Getting More Scrutiny After Kelo*, N.J. L.J., Oct. 24, 2005 (“Housing law experts call the phenomenon ‘Kelo blowback.’”).

<sup>45</sup> Avi Salzman & Laura Mansnerus, *For Homeowners, Frustration and Anger at Court Ruling*, N.Y. TIMES, June 24, 2005, at A20; *Protect Your Private Property*, CHATTANOOGA TIMES FREE PRESS, July 14, 2005, at 72 (stating that the Court “made a horrible error”); Letter to the Editor, *Supreme Justice*, PITT. TRIB.-REV., July 15, 2005 (calling for the town in which Justice Souter, who signed on with the majority in the *Kelo* opinion, resides, to condemn his property for the sake of private development); Coleman, *supra* note 5 (“[T]he ruling appears to dilute classical American values, such as the right to own property and the freedom from governmental intrusion.”); David Moberg, *Imminent Domination: Progressives Cannot Allow Libertarians to Lead the Fight Against the Misuse of Eminent Domain*, IN THESE TIMES, Oct. 24, 2005, at 26 (explaining that the attack against *Kelo* goes from both sides, the right and left, of the political spectrum).

<sup>46</sup> Brandon Dutcher, *Real Role of Government*, OKLAHOMAN, July 15, 2005, at 11A (stating that the Court’s decision has “gotten folks riled up”); Bert Caldwell, ‘Public Use’



immediately pushed the legislature to restrict the government's ability to take private property for private development.<sup>47</sup> For example, citizens created campaigns to thwart future efforts by local governments to take property for private development.<sup>48</sup> More importantly, state legislatures quickly passed laws to tighten the restrictions placed on local governments' takings powers.<sup>49</sup>

The majority of states have enacted bills that have similar, essential elements which alone will not be strong enough to effectively curb the taking of property for private development. Generally, these new state bills ban all takings of unblighted private property for private development.<sup>50</sup> However, the majority of states have not extended this protection to property that is

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*May Enter a New Domain*, SPOKESMAN-REVIEW (Spokane, Wash.), July 7, 2005, at 10A (quoting Steven Calandrillo, Professor of Law, University of Washington, stating that the public use provision now has no teeth); see also Boudreaux, *supra* note 18, at 15. A number of legal scholars have attacked the weakening of the public use standard on several angles. These have ranged from loss of economic efficiency, uncompensated psychological costs of losing one's property, and loss of faith in the political system, to the disparate impact on African Americans. In fact, even before *Kelo*, legal scholars criticized federal and state courts for eliminating the public use clause. See, e.g., Eric R. Claeys, *Public Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 878 (explaining that the public use clause is essentially comprised of "dead letters" . . . [and courts] "have created a strong impression that state and federal public use limitations allow governments to redistribute land between private owners, as long as they can show that the redistributions will increase tax revenues, employment, and other public indicators of economic vitality"). But see Paul Edmondson, *Some Thoughts About the Kelo Decision for Members of the Historic Preservation Community*, ALI-ABA COURSE STUDY OF MATERIALS, Aug. 2, 2005 ("Many constitutional analysts believe that the Supreme Court's decision in *Kelo* . . . does *not* substantially change the playing field for state, federal or local governments. A few commentators have even suggested that the case narrows the authority in certain respects.") (emphasis in original).

<sup>47</sup> Boudreaux, *supra* note 18, at 3.

<sup>48</sup> Cathy Kingsley, *'Hands Off My Home' Campaign Addresses Eminent Domain Case*, ST. LOUIS DAILY REC., July 15, 2005 ("The 'Hands Off My Home' campaign will give ordinary citizens the means to protect their homes from government-forced takings for private development.").

<sup>49</sup> See, e.g., Eminent Domain—Moratorium—Legislative Task Force, 2005 Ohio Legis. Serv. Ann. L-2338 (West) (placing a moratorium on all non-consensual takings of unblighted private property, where the primary purpose is for economic development and the property is to be transferred to another individual); John R. Nolan & Jessica A. Bacher, *Fallout From 'Kelo': Ruling Spurs Legislative Proposals to Limit Takings*, N.Y. L.J., Oct. 19, 2005, at 5.

<sup>50</sup> Robert Cassidy, *Eminent Domain Revisited*, BUILDING DESIGN AND CONSTRUCTION, Jan. 2006, at 7 (describing the new state statutes and how they tighten the restrictions on the use of eminent domain).

blighted.<sup>51</sup> Blight is generally defined as “the state of being a slum, a breeding ground for crime, disease, and unhealthful living conditions.”<sup>52</sup> If such property is blighted, local governments are free to take the property under these state statutes.<sup>53</sup> The Supreme Court has already declared that the removal of blight satisfies the public use requirement of the Fifth Amendment.<sup>54</sup> Consequently, government may take private property to transfer it to another individual who intends to renovate or remove the existing structure if such property is blighted.<sup>55</sup>

Before *Kelo*, the constitutionality of the condemning authority’s taking hinged on whether government officials could demonstrate that the taking served a “public use” and the property owners were given “just compensation” for their property to satisfy the Fifth Amendment.<sup>56</sup> After *Kelo*, the just compensation obligation has remained unchanged, but the public use requirement has become “toothless.”<sup>57</sup> As a result of the public reaction to *Kelo*, these new laws will force courts to focus on a different area in an appropriation proceeding. To determine whether the condemning authority’s taking is constitutional, the important factor for the courts is no

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<sup>51</sup> *Id.* Currently, there are four enacted statutes in Alabama, Delaware, Ohio, and Texas and many going through their respective state legislatures. David Peterson, *Eminent Domain Is Pitting Citizens Against Their City*, STAR TRIB., Apr. 6, 2006, at A1 (reporting that there are thirty-two states that are attempting to pass eminent domain legislation).

<sup>52</sup> Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389, 393 (2000). The word “blight” is also commonly known as, and is synonymous with, a “blighted area.” See, e.g., ALASKA STAT. § 18.55.950 (2004); MICH. COMP. LAWS ANN. § 125.72 (West 1997); W. VA. CODE ANN. § 7-11B-3 (West 2002); Alyson Tomme, Note, *Tax Increment Financing: Public Use or Private Abuse?*, 90 MINN. L. REV. 213, 220 (2005).

<sup>53</sup> It is acknowledged that state constitutions may be more restrictive than the U.S. Constitution and that *Kelo* had no effect on some states’ laws. However, this Note will not discuss the differences in takings laws among the states.

<sup>54</sup> *Berman v. Parker*, 348 U.S. 26, 32–33 (1954) (“Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. . . . They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.”).

<sup>55</sup> *Id.* at 33. This holding has not been seriously questioned or revisited in its over fifty-year life by the Supreme Court.

<sup>56</sup> See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

<sup>57</sup> Boudreaux, *supra* note 18, at 4 (“A number of social phenomena have strengthened the chorus against eminent domain, including its often-toothless ‘public use’ requirement.”); Madigan, *supra* note 25, at 192.

longer whether the taking serves a public purpose.<sup>58</sup> That step in an appropriation procedure has now been given almost complete deference to the local officials.<sup>59</sup> Under the recently enacted statutes, the crucial factor to determine whether a taking is constitutional is to decide if the property being appropriated is blighted. Moreover, whether there is blight will hinge on each state's definition and the local government official's designation of blight.<sup>60</sup>

### III. THE MALLEABLE DEFINITION OF BLIGHT

Because the new state statutes have created the condition where the validity of the taking will hinge on the definition of blight, it is important to examine the states' definitions of blight. Practically every state has its own statutory definition of blight or blighted areas.<sup>61</sup> All of the statutes vary to a

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<sup>58</sup> See *id.* The state legislatures only tightened the "public use" provision but did nothing to the *Berman* taking.

<sup>59</sup> See *Kelo v. City of New London*, 125 S. Ct. 2655, 2664 (2005); Madigan, *supra* note 25, at 192.

<sup>60</sup> See Brown, *supra* note 15, at 219 (describing Colorado's definition of blight).

<sup>61</sup> See ALA. CODE § 24-2-2 (LexisNexis 2000 & Supp. 2006); ALASKA STAT. § 18.55.950 (2004); ARIZ. REV. STAT. ANN. § 36-1471 (Supp. 2005); ARK. CODE ANN. § 14-168-301 (Supp. 2005); CAL. HEALTH & SAFETY CODE §§ 33030, 33031 (West 1999); COLO. REV. STAT. § 31-25-103 (2004); DEL. CODE ANN. tit. 31, § 4501 (1997 & Supp. 2005); D.C. CODE § 2-1219.01 (2005); FLA. STAT. ANN. § 163.340 (West 2006); GA. CODE ANN. § 8-4-3 (2004); HAW. REV. STAT. § 53-1 (1993 & Supp. 2005); 65 ILL. COMP. STAT. ANN. 5/11-74.2-2 (West 2005); IOWA CODE ANN. § 403.17 (West 1999 & Supp. 2006); KAN. STAT. ANN. § 12-1770a (2001 & Supp. 2005); KY. REV. STAT. ANN. § 99.340 (LexisNexis 2004); LA. REV. STAT. ANN. § 33:4720.71 (Supp. 2006); ME. REV. STAT. ANN. tit. 30-A, § 5202 (1996 & Supp. 2005); MD. ANN. CODE art. 41, § 14-805(a) (2006); MASS. LAWS ANN. ch. 121B § 1 (LexisNexis 2003); MICH. COMP. LAWS ANN. § 125.72 (West 1997); MINN. STAT. ANN. § 469.002 (West 2001); MISS. CODE ANN. § 43-35-3 (West 1999); MO. ANN. STAT. § 67.1401 (West Supp. 2006); MONT. CODE ANN. § 7-15-4206 (2006); NEB. REV. STAT. § 13-1101 (2003); NEV. REV. STAT. ANN. § 279.388 (LexisNexis 2002 & Supp. 2005); N.H. REV. STAT. ANN. § 205:2 (2000); N.J. STAT. ANN. § 1:1-2b (West 1992); N.M. STAT. ANN. § 3-46-10 (LexisNexis 2004); N.Y. GEN. MUN. LAW § 970-c (McKinney 1999); N.C. GEN. STAT. § 160A-503 (2005); N.D. CENT. CODE § 40-58-01.1 (2006); OHIO REV. CODE ANN. § 303.26 (West 2005); OKLA. STAT. ANN. tit. 11, § 38-101 (West 1994); OR. REV. STAT. § 457.010 (2005); 35 PA. STAT. ANN. § 1712.1 (West 2003); R.I. GEN. LAWS § 45-31-8 (1999); S.C. CODE ANN. § 6-33-30 (2004); S.D. CODIFIED LAWS § 11-7-3 (2004); TENN. CODE ANN. § 13-20-201 (1999); TEX. LOC. GOV'T CODE ANN. § 374.003 (Vernon 2005); UTAH CODE ANN. § 9-4-602 (2003); UTAH CODE ANN. § 17B-4-604 (2004), *amended by* S.B. 245, 2006-2 Utah Adv. Legis. Serv. 1064 (LexisNexis); VT. STAT. ANN. tit. 24, § 3201 (2005), *amended by* S.B. 246, 2006-2 Vt. Adv. Legis. Serv. 25 (LexisNexis); VA. CODE ANN. § 36-3 (Supp. 2006); WASH. REV. CODE ANN. § 35.81.015 (West 2002); W. VA. CODE ANN. § 7-11B-3 (West 2002); WIS. STAT. ANN. §§ 32.22(1), 66.1333 (West 1999); WYO. STAT. ANN.

degree, and some are vastly different.<sup>62</sup> Moreover, within each state, each municipality, township and county has their own definition of blight.<sup>63</sup> However, all of the statutes have one common theme: they are extremely malleable and all of them, even the ones with stricter definitions, can be construed in the local government's favor and to the property owner's detriment.<sup>64</sup>

Generally, the definition of blight in each state has several common elements.<sup>65</sup> First, a typical statute includes language that the blighted area comprises structures that are "deteriorating,"<sup>66</sup> "dilapidated,"<sup>67</sup> "defective,"<sup>68</sup> and "obsolescent."<sup>69</sup> Second, the definition involves a threat to public safety. This element's language can be very broad, such as "unsanitary or unsafe conditions"<sup>70</sup> and a "menace to the public health, safety, morals, or welfare,"<sup>71</sup> or the language can be specific, such as an area "which endanger[s] life or property, by fire or other causes."<sup>72</sup> Third, the definition is often used as an attempt to thwart crime.<sup>73</sup> Fourth, the blighted area suffers from "defective or inadequate [road or] street layout."<sup>74</sup> Fifth, states have a clause in the statute stating that if an area slows the development of a neighborhood then it will be considered as blighted. This language frequently

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§ 15-9-103(a) (2005). Connecticut, Idaho and Indiana do not have statutory definitions for "blight."

<sup>62</sup> See *supra* note 61.

<sup>63</sup> For the purpose of this Note and for simplicity, I will not focus on the definition of blight for particular municipalities. Rather, I will only focus on state statutory definitions. No significant legal analysis will be sacrificed in the process.

<sup>64</sup> See, e.g., CAL. HEALTH & SAFETY CODE §§ 33030, 33031 (West 1999). Despite the presence of quantifiable standards, there are many elements of this definition that still show it is malleable enough that local governments may abuse it.

<sup>65</sup> See, e.g., MISS. CODE ANN. § 43-35-3 (1999); Mississippi's statute is an almost word-for-word copy of the statutes of Iowa, New Mexico, Vermont, and Wyoming. There are only a few phrases that are different in each statute. IOWA. CODE ANN. § 403.17 (West 1999 & Supp. 2006); N.M. STAT. ANN. § 3-46-10 (LexisNexis 2004); VT. STAT. ANN. tit. 24, § 3201 (2005), *amended by* S.B. 246, 2006-2 Vt. Adv. Legis. Serv. 25 (LexisNexis); WYO. STAT. ANN. § 15-9-103(a) (2005).

<sup>66</sup> See, e.g., LA. REV. STAT. ANN. § 33:472071 (Supp. 2006).

<sup>67</sup> See, e.g., 35 PA. STAT. ANN. § 1712.1 (West 2003).

<sup>68</sup> See, e.g., UTAH CODE ANN. § 17C-2-303 (2004 & Supp. 2006).

<sup>69</sup> See, e.g., DEL. CODE ANN. tit. 31, § 4501 (1997 & Supp. 2005).

<sup>70</sup> See, e.g., ALASKA STAT. § 18.55.950 (2004).

<sup>71</sup> See, e.g., ARK. CODE ANN. § 14-168-301 (Supp. 2005).

<sup>72</sup> See, e.g., D.C. CODE § 2-1219.01 (2005).

<sup>73</sup> See, e.g., GA. CODE ANN. § 8-4-3 (West 2004).

<sup>74</sup> See N.C. GEN. STAT. § 160A-503 (West 2005) North Carolina also includes the phrase "is conducive to ill health, transmission of disease, or infant mortality." *Id.*

reads “retards the provision of housing accommodations”<sup>75</sup> or causes “stagnant and unproductive condition of land.”<sup>76</sup>

Beyond these five general elements, the states’ definitions can differ greatly. Some states provide a more rigid definition for blight. In fact, eight states demand a quantifiable standard for the definition of a blighted area.<sup>77</sup> A quantifiable standard limits the discretion of a board of commissioners, or whatever particular agency is charged with designating blight for that municipality, from using the amorphous term for its own advantage. For example, in Delaware, an “unimproved vacant land” is not deemed blighted unless it “has remained so for a period of 10 years prior to the date of the public hearing.”<sup>78</sup> Other states have chosen to keep the definition extremely broad.<sup>79</sup> In some states the definition allows for property to be considered blighted if there may be future blight. Thus, when the designating agency examines the property, it can designate the property blighted if the property may potentially become blighted.<sup>80</sup> There are also several questionable elements to a number of the states’ definitions for blight. For example, many states have retained a provision in their definitions prohibiting “diversity of ownership.”<sup>81</sup> Notwithstanding *Norwood v. Horney*, a definition for this

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<sup>75</sup> See, e.g., IOWA. CODE ANN. § 403.17 (1999 & Supp. 2006).

<sup>76</sup> See, e.g., DEL. CODE ANN. tit. 31, § 4501 (2005) The Delaware statute also includes the provision: “[h]as contributed to a quantified disproportionate exodus of families and businesses from the surrounding neighborhood.” *Id.*

<sup>77</sup> Colin Gordon, *Special Series: Developing Sustainable Urban Communities: Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 320 n.134 (2004). These eight states are Alabama, Arkansas, California, Massachusetts, Minnesota, Nebraska, and South Dakota. See ALA. CODE § 24-2-2 (LexisNexis 2000 & Supp. 2006); ARK. CODE ANN. § 14-168-301 (Supp. 2005); CAL. HEALTH & SAFETY CODE § 33030.1(B) (West 1999); MASS. GEN. LAWS ANN. ch. 121B, § 1 (LexisNexis 2003); MINN. STAT. ANN. § 469.002 (West 2001); NEB. REV. STAT. § 13-1101 (2004); S.D. CODIFIED LAWS § 11-7-3 (2003); see also Craig L. Johnson & Kenneth A. Kriz, *A Review of State Tax Increment Financing Laws*, in TAX INCREMENTAL FINANCING AND ECONOMIC DEVELOPMENT: USES, STRUCTURES AND IMPACT 31, 38–39 (Craig L. Johnson & Joyce Y. Man eds., 2001).

<sup>78</sup> DEL. CODE ANN. tit. 31, § 4501 (2005).

<sup>79</sup> See, e.g., ALASKA STAT. § 18.55.950 (2004) (providing no quantifiable standard).

<sup>80</sup> OHIO REV. CODE ANN. § 303.26 (West 2005). See *City of Norwood v. Horney*, 830 N.E.2d 381, 388–90 (Ohio Ct. App. 2005); *Norwood v. Horney*, 853 N.E.2d 1115, 1145 (Ohio 2006) (holding that “what [a property] *might* become may be no more likely than what *might not* become. Such a speculative standard is inappropriate in the context of eminent domain.”).

<sup>81</sup> Out of the fifty states and the District of Columbia, only twenty-five of the fifty-one included “diversity of ownership” as an element of blight. However, a search in Westlaw produced no hits that defined this term or explained when it has been used to condemn a property.

phrase could not be found but can only be seen as extremely nebulous, potentially violative of the Fourteenth Amendment, and not supportive of any public policy argument.<sup>82</sup>

#### IV. GREAT DEFERENCE GIVEN TO LOCAL OFFICIALS AND THE EFFECT IT HAS HAD UPON THE PROPERTY OWNERS

In practice, state and local governments have enjoyed broad discretion in determining both the definition of blight and the designation thereof.<sup>83</sup> Courts review local officials' blighted property designations under an abuse of discretion standard—a high standard for any property owner to overcome in court.<sup>84</sup> For the majority of states, this taking procedure occurs in three phases.<sup>85</sup> First, local officials must make a finding that the proposed property is blighted.<sup>86</sup> Second, they can then commence appropriation proceedings

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<sup>82</sup> *Horney*, 853 N.E.2d at 1144 (Diversity of ownership “is susceptible of many meanings and to manipulation.”); *Beach-Courchesne v. Diamond Bar*, 95 Cal. Rptr. 2d 265, 277 (Cal. Ct. App. 2000) (“The mere fact of multiple ownership does not establish blight.”).

<sup>83</sup> *Gordon*, *supra* note 77, at 322 (“[S]tate courts have almost invariably upheld local designations of blight, deferring to local legislative authority in determining both the meaning of blight and the larger public purpose served by redevelopment.”); *see also* George Lefcoe, *Finding the Blight That's Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 992 (2001) (“Blight removal brought redevelopment well within the ambit of ‘health and safety’ since policy makers at that time were convinced that overcrowding in low income areas contributed to the spread of disease and crime.”). Lefcoe continues later that under the umbrella of “health and safety” government officials could extend their reach: “condemnation incidental to such programs would [also] pass constitutional muster. . . . By tying the legitimacy of redevelopment to slum clearance or blight removal, courts extended only slightly the power local governments had long possessed to demolish dangerously dilapidated housing upon the neglect or refusal of private owners to do so.” *Id.* at 993.

<sup>84</sup> *See, e.g., Horney*, 830 N.E.2d at 384 (“We review . . . under an abuse-of-discretion standard. An abuse of discretion occurs when a city council’s decision is unreasonable. A trial court’s decision is unreasonable if there is no sound reasoning process that would support that decision.”); *But see, e.g., Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 111 (N.J. Super. Ct. Law Div. 1998) (property owner wins judgment overruling blight designation); *Lazzarotti*, *supra* note 14, at 51 (predicting this potential abuse of power by stating “it is apparent that the structure of our Constitution was intended to place upon the courts the duty to hold the legislature within its enumerated authority”). The article continues by describing that this situation is a danger about which James Madison warned. “The danger here is that . . . courts have accepted their role in eminent domain cases as being ‘an extremely narrow one. . . .’” *Id.*

<sup>85</sup> *Brown*, *supra* note 15, at 219 (criticizing Ohio’s blight statute).

<sup>86</sup> *Id.* It is acknowledged that all states vary to some degree.

and take the property.<sup>87</sup> Third, only after they have acquired the property may the local government officials transfer the property to a private developer.<sup>88</sup> State courts have split in holding whether property owners generally have a civil recourse to overturn a blight designation by local officials before the commencement of an eminent domain proceeding.<sup>89</sup> However, once the local government uses the blight designation to take the property, states have consistently held that a property owner does have standing to challenge an eminent domain proceeding.<sup>90</sup>

At first glance, this arrangement should be both appropriate and satisfactory. Eminent domain can serve many noble and beneficial purposes.<sup>91</sup> Governments must be able to promote healthy growth by installing the necessary infrastructure for a community, such as roads, hospitals, schools, and sewers.<sup>92</sup> This governmental power is an effective

<sup>87</sup> *Id.* This step is a rather formulaic procedure requiring little effort by the appropriating agency.

<sup>88</sup> *Id.* This step can be as simple as transferring the deed.

<sup>89</sup> *See, e.g., Gamble v. City of Norwood*, No. C-040019, 2004 WL 1948690, at \*4 (Ohio App. 1st Sept. 3, 2004) (holding that property owner had standing to challenge a blight designation even before the appropriating authority commenced proceedings to take the property); *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1 (Nev. 2003) (holding that property owners had standing to challenge blight designation before appropriation action occurred).

<sup>90</sup> *See, e.g., Gamble*, 2004 WL 1948690, at \*4 (“[I]t would be fundamentally unfair to make property owners wait until appropriation proceedings are commenced (if they ever are) before they can legally challenge the designation of the area in which their property lies as blighted, deteriorated, or deteriorating.”).

<sup>91</sup> It should be noted that many legal commentators have found that the Framers of the Constitution did not imagine that eminent domain would be exercised for anything other than the taking of property for “useful public land—roads are the classic example—but not for the personal desires or whims of the king, as was sometimes the practice in England, or his future American counterparts.” Boudreaux, *supra* note 18, at 7; *see also* Donald J. Kochan, “Public Use” and the Independent Judiciary: *Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 65–71 (1998) (addressing how the public use clause may obstruct takings for private use).

<sup>92</sup> *See* Kruckeberg, *supra* note 16, at 545. *See, e.g., Univ. of N.C. v. Foy*, 5 N.C. 58 (1805) (authorizing use of University’s taking power to take land to build public schools); *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 24 Mass. 344 (1829) (holding that use of eminent domain to build bridge was proper); *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. 821 (C.C.N.J. 1830) (allowing appropriating authority to take land to build a road); *Kohl v. United States*, 91 U.S. 367, 371 (1875) (permitting government’s power of eminent domain to take property for the future use of the U.S. Postal Service and, in dicta, stating that the government could take property for “forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses”). Recently, broad interpretations of the public use clause have permitted property to be taken for the following: *Kansas ex rel. Tomasic v. Unified Gov’t of Wyandotte County/Kansas City*, 962 P.2d 543, 561 (Kan. 1998) (auto race track); *City*

mechanism “to promote the general welfare and to obtain an ordered society.”<sup>93</sup> To a degree, as a country we do not want to impede the progress of growing cities, towns, and counties.<sup>94</sup> This governmental power is no less necessary than for the removal of blight. To properly prevent and condemn blight, most state legislatures have created a statutory definition of blight in their state.<sup>95</sup> Moreover, local officials should have some leeway in designating whether the “dilapidat[ed], deteriorat[ed] . . . or obsole[te]”<sup>96</sup> area fits into the statutory definition on a case-by-case basis. After all, these local officials are in the best position to make that determination.<sup>97</sup> As a result, these determinations of blight generally go unchallenged by the residents of the blighted area.<sup>98</sup>

### A. *The Benefits of the Removal of Blight*

Removing blight is important for the community and the public welfare.<sup>99</sup> Structurally, it ensures that buildings are durable and safe, the conditions of these buildings are sanitary, and there are adequate road layouts.<sup>100</sup> This power allows the government to provide roads, libraries,

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of *Oakland v. Oakland Raiders*, 646 P.2d 835, 844–45 (Cal. 1982) (National Football League franchise); *Matter of Condemnation by Minneapolis Cmty. Dev. Agency*, 582 N.W.2d 596, 598 (Minn. Court. App. 1998) (retail store with a parking garage and a nearby office building).

<sup>93</sup> Lazzarotti, *supra* note 14, at 50 (analyzing the public use requirement and the abuse of private, for profit, corporations who utilize the government’s taking power).

<sup>94</sup> Sandefur, *supra* note 35 at 17 (criticizing state statutes authorizing eminent domain through the use of blight).

<sup>95</sup> See *supra* note 61 (list of state statutes defining blight).

<sup>96</sup> ARK. CODE ANN. § 14-168-301(3)(A) (West 2005). These three words in the state statutes are the ones most commonly used to describe blight or a blighted area.

<sup>97</sup> Lazzarotti, *supra* note 14, at 67 (“Determining what the public needs and how to satisfy those needs should obviously be within the province of those representing the public.”); See, e.g., *City of Norwood v. Horney*, 161 Ohio App. 3d 316, 326 (2005) (A court will “not substitute [its] judgment for that of the legislative body of the city in an area appropriate for legislative determination”).

<sup>98</sup> Bruce Tepper, *Departments: Practice Tips: Federal Court Limitations on Redevelopment Agencies: The Definition of Public Use May Hinge on a Parcel-Specific Finding of Blight*, 27 L.A. LAW. 12, 14 (2004) (“Most determinations of blight go unchallenged.”).

<sup>99</sup> *Berman v. Parker*, 348 U.S. 26, 33 (1954) (“The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”) (internal citations omitted).

<sup>100</sup> *Humphrey v. Phoenix*, 102 P.2d 82, 83 (Ariz. 1940) (Eminent domain “is intended to enable cities and towns of the state, in which unsafe and insanitary housing



schools, and other public facilities, which may assist in the growth of a community.<sup>101</sup> Moreover, the threat of the determination of blight is an effective mechanism to ensure that commercial building owners and other property owners meet all building codes and standards.<sup>102</sup> Otherwise, the government can declare the property blighted, and the owner will lose his or her property. Sociologically, it has been shown to effectively remove slums, drug dealers, and the threat of crime in areas.<sup>103</sup> Aesthetically, it is effective in removing “eye-sores” and maintaining an area’s beauty.<sup>104</sup>

### *B. The Great Discretion Given to Local Officials Has Caused Immense Problems with Current Property Law*

Despite these beneficial attributes of the government’s power to designate a property as blighted, there are also severe drawbacks to local officials’ determination powers. Blight, despite its long description in these statutes,<sup>105</sup> is such a flexible term that local government officials, with the assistance of the great deference given to their judgment, can prevail on most arguments that designate certain properties as blighted.<sup>106</sup> Most will agree that property should be designated as blighted when it is “dangerous property. It is property that attracts rats. It is property that is going to fall

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conditions exist, to remove such conditions and substitute therefore safe and sanitary dwellings.”).

<sup>101</sup> Shannon L. Goessling, Editorial, *Property Seizures: Law Fails the People*, ATLANTA J.-CONST., Jan. 5, 2006, at 13A (“There are legitimate uses of the power of eminent domain—government buildings, roads, public facilities, libraries, schools and the like. Used effectively . . . the condemnation process for public purposes can serve as an important catalyst for redeveloping struggling areas.” With the cooperation of both property owners and developers, the government “can embrace a long-term plan that actually benefits communities without seizing property for nonpublic purposes. After all, do we really want taxpayers to underwrite local governments in the land speculating business?”).

<sup>102</sup> This conclusion is based on the reasonable premise that people do not want to lose their land. If they would want to dispose of it, then they would sell the property and retain the proceeds.

<sup>103</sup> See *Berman*, 348 U.S. at 32–33.

<sup>104</sup> Mark Bobrowski, *Scenic Landscape Protection Under the Police Power*, 22 B.C. ENVTL. AFF. L. REV. 697, 718 (1995) (“[A]esthetic goals have been accepted in a majority of jurisdictions as a legitimate exercise of the police power, even when standing alone.”). However, Bobrowski notes that “[i]n endorsing the use of the police power to accomplish purely aesthetic goals, rarely does a reviewing court express its understanding of the nexus between aesthetics and the general welfare. Of course, courts embracing the pursuit of aesthetic goals sometimes acknowledge that beauty is preferable to blight.” *Id.*

<sup>105</sup> See *supra* note 61 (citing all state statutes).

<sup>106</sup> See *infra* Part V.

down. It is property that is going to burn up.”<sup>107</sup> However, the range of interpretation of these statutes produces vast gray areas in the law. Blight is in the eye of the beholder,<sup>108</sup> and “[o]ne person’s castle might be another person’s blight.”<sup>109</sup> For example, a person who is near or below the poverty line might have a completely different opinion of what should be blight than a politically influential developer might have, licking his financial chops, who believes the area is perfect for his pet project, perhaps a mixed-use development consisting of business, retail, and condominiums.

Blight has been developed over the years “to encompass the wide range of projects that local government and private developers presently contemplate.”<sup>110</sup> “Under the banner of economic development,”<sup>111</sup> government officials resort to being creative (and manipulative) in using their state’s corresponding definition of blight to designate a property blighted.<sup>112</sup> In other words, the definition of blight has been extended to broadly apply to just about anything a government official—many times with the help and encouragement of a private developer—can justify with a straight face.<sup>113</sup> The judiciary’s lackadaisical enforcement of the definition of blight has caused government officials to abuse the definition.<sup>114</sup>

State legislatures, intending to curb the result of *Kelo*, have left a large loophole within the law. They tried to restrict a *Kelo*-taking by wholly eliminating ways for local officials to take property for the sake of economic development.<sup>115</sup> However, this method is not entirely effective. The state

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<sup>107</sup> Warren Richey, *Fracas Over Home Seizures Moves to States*, CHRISTIAN SCIENCE MONITOR, Dec. 15, 2005, at 1 (quoting Timothy Sandefur, an attorney with the Pacific Legal Foundation, who opposes some of the latest property reform bills arising from *Kelo*).

<sup>108</sup> Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 52 (2003) (describing the recent eminent domain abuses caused by local officials throughout the country).

<sup>109</sup> Editorial, *Local Lawmakers to Help Devise New Eminent Domain Safeguards*, ASHEVILLE CITIZEN-TIMES, Dec. 8, 2005, at 8A.

<sup>110</sup> Tomme, *supra* note 52, at 239 (describing the abuse of eminent domain through the use of tax increment financing).

<sup>111</sup> *Kelo v. City of New London*, 125 S. Ct. 2655, 2671 (2005) (O’Connor, J., dissenting) (criticizing the majority for eliminating the public use requirement).

<sup>112</sup> Sandefur, *supra* note 35, at 17 (criticizing state statutes authorizing eminent domain through the use of blight).

<sup>113</sup> See *supra* note 43 and accompanying text.

<sup>114</sup> Charley Shaw, *Eminent Domain Will Get Airing in 2006 Legislative Session*, FIN. & COM., Jan. 12, 2006 (“We want to have a clear definition in the statute of the definition of blight so it can’t be abused. Currently it is being abused.”) (quoting Minnesota state representative Jeff Johnson).

<sup>115</sup> Oddly, the state legislatures could have required courts to review the “public use” prong under strict scrutiny rather than with great deference. See generally Philip

legislatures have left government officials with another avenue to take the property while still benefiting from the great deference given by the Court.<sup>116</sup> As stated above, a government's determination and designation of blight is held to a highly deferential standard by the Court.<sup>117</sup> Because the new statutes hinge on the definition of blight, government officials may still take the property for private development; only now they must cloak their true purpose with the argument that the condemned property is blighted.<sup>118</sup> With this great deference, property owners are at the mercy of these local officials. The remedy employed to defend these takings—judicial oversight—will have no effect as long as government officials may claim that a certain property is blighted. Thus, the government still has a significant upper hand in the fight over property owners' homes. The only difference is that the battleground for such a dispute has changed: no longer is the current context of the fight whether there is a public purpose; rather, it is whether the property is blighted.

This result comes at a price beyond simply forcing individuals to leave their homes or businesses for the sake of another, which may be considered unfortunate enough as it is. "Urban renewal [through the use of eminent domain] is now widely recognized as one of the worst policy initiatives ever undertaken in our cities."<sup>119</sup> Not only is this process generally thought to be

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Ewing, *House OKs Curbs on Eminent Domain*, ST. LOUIS POST-DISPATCH, Apr. 20, 2006, at A1. Rather than forcing the government to show that its purpose was legitimate and its means not irrational, this method would have forced officials to show that the condemnation would, with a reasonable certainty, provide the expected public benefits. This burden would be much higher and would impede many future eminent domain suits over blighted and non-blighted properties for private development. However, this Note will not examine the effectiveness of such a statute. Instead, this Note will focus on the existing statutes and the ways to effectively eliminate government officials' abuse of eminent domain for the sake of private development.

<sup>116</sup> See, e.g., *City of Norwood v. Horney*, 830 N.E.2d 381, 387 (Ohio Ct. App. 2005) (using blight designation to take property because the state statute does not permit eminent domain for the sake of private development).

<sup>117</sup> See, e.g., *id.* at 326 ("[A court] will not substitute its judgment for that of the legislative body of the city in an area appropriate for legislative determination.").

<sup>118</sup> See, e.g., *Eminent Domain-Moratorium-Legislative Task Force 2005*, Ohio Legis. Serv. Ann. L-2338 (West) ("To establish, until December 31, 2006, a moratorium on the use of eminent domain by any entity of the state government . . . to take . . . private property that is in an unblighted area when the primary purpose for the taking is economic development that will ultimately result in ownership of the property being vested in another private person.").

<sup>119</sup> Dana Berliner, Kelo v. City of New London: *What it Means and the Need for Real Eminent Domain Reform*, in ALI-ABA COURSE OF STUDY MATERIALS: EMINENT DOMAIN AND LAND VALUATION LITIGATION 145, 150 (2006) (citing MINDY THOMPSON FULLILOVE, *ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT* (2005)).

ineffective, it is also considered to cause more harm than good.<sup>120</sup> Few projects are even remotely successful.<sup>121</sup> When they are, local governments cite to the minority of projects that are successful to support the argument that these redevelopments are generally helpful.<sup>122</sup>

More specifically, the taking of loosely termed blighted property has a disparately adverse effect on certain groups of individuals. First, it unequally harms the economically deprived classes and enriches the wealthy, ranging from the developers and their investors to the future, affluent tenants of those developments.<sup>123</sup> The private developers benefit from receiving premier land at a shockingly low price, and other large companies profit from receiving the new office or retail space with the added benefit of subsidized taxes.<sup>124</sup> Second, it has specifically advantaged the politically savvy<sup>125</sup>—the “small group of wealthy, well-connected political insiders”<sup>126</sup>—to the detriment of the politically underrepresented. Third, these redevelopment efforts disparately impair minorities over whites.<sup>127</sup> In fact, they have been dubbed

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<sup>120</sup> Gideon Kanner, *Kelo v. City of New London: Bad Law, Bad Policy and Bad Judgment*, in ALI-ABA COURSE OF STUDY MATERIALS: EMINENT DOMAIN AND LAND VALUATION LITIGATION 1, 25 (2006) (“[R]edevlopment in America has been something less than the success its proponents always promise but never deliver, and it has been carried out at an unconscionably high social and economic price.”).

<sup>121</sup> *Id.* (“[Many of these] redevelopment projects fail altogether, leaving the local city and its taxpayers holding the bag.”).

<sup>122</sup> *Id.* (“Notably, such arguments are typically couched as predictions in broad, sweeping assertions, without reference to specifics. When specifics are offered, they tend to relate to the success of specific projects.”).

<sup>123</sup> Editorial, *Kennedy's Vast Domain: The Supreme Court's Reverse Robin Hoods*, WALL ST. J., June 24, 2005, at A12.

<sup>124</sup> See *infra* note 155. In Long Branch, New Jersey, the local government gave the land to the incoming companies at a very low price with, many times, discounts on tax rates and so forth. *Id.*

<sup>125</sup> Boudreaux, *supra* note 18, at 22 (“[T]he poor people in the community, most of whom are African American or Latino, don’t have the [political] clout that the developers have.”); Kruckeberg, *supra* note 16, at 543 (“Corporations, using cities as their personal real estate agents, are proposing the following assignment: ‘Find me your most prominent location, get rid of what is on it, help me pay for it, and maybe you will be lucky enough to have me move to your city.’”).

<sup>126</sup> See *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981). Detroit bestowed General Motors with eminent domain powers and General Motors took wholesale the working-class neighborhood. *Id.*

<sup>127</sup> McFarland, *supra* note 23, at 150 (“Whole neighborhoods, often populated primarily by African Americans, other minority groups, and senior citizens are being cleared for such ‘public uses’ as a new Costco, a pharmaceutical plant, or just more expensive houses.”); Berliner, *supra* note 119, at 150 (citing Brief of NAACP, AARP, et al. as Amici Curiae in Support of Petitioners, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108), 2004 WL 2811057).

“negro removal” to describe this negative effect towards African-Americans.<sup>128</sup> For instance, the government’s taking in *Berman v. Parker* displaced 5012 people, of which 97.5 percent were African-American.<sup>129</sup> On another note, even the mere threat of eminent domain stymies these neighborhoods’ ability to appreciate in value or to promote themselves. “It puts a shadow over the neighborhood” and people cannot sell their homes or rent their apartments.<sup>130</sup>

#### V. EMINENT DOMAIN CASES DEMONSTRATING GOVERNMENT ABUSE OF THE STATUTORY DEFINITION OF BLIGHT

Local governments have been able to exploit the malleable definition of blight to take property for the sake of private development.<sup>131</sup> The local government’s ability to designate any property it so chooses as blighted has rendered these properties unsafe from the power of eminent domain to take property from the hands of the poor and minorities and give it to those that are politically influential and wealthy. Several cases and incidents will now be discussed to demonstrate the government’s abuse of the definition of blight.<sup>132</sup>

The City of Norwood, located within the city limits of Cincinnati, Ohio, had been a thriving community throughout the twentieth-century.<sup>133</sup> It had

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<sup>128</sup> Boudreaux, *supra* note 18, at 9 (comparing today’s redevelopment efforts to past redevelopment initiatives as “Negro removal.”). Boudreaux later discusses examples of this negative effect on African-Americans. For example, in Long Branch, N.J., the town has used eminent domain and the definition of blight to remove more than three hundred people, many of whom are black, for redevelopment projects. *Id.* at 21.

<sup>129</sup> *Berman v. Parker*, 348 U.S. 26 (1954); JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961) (criticizing the disproportionate effect against minorities caused by redevelopment efforts).

<sup>130</sup> Marie Price, *Their Way or the Highway*, *TULSA WORLD*, Nov. 21, 2005, at A11 (quoting Robert Nichols, a Tulsa attorney, involved in eminent domain litigation).

<sup>131</sup> See, e.g., *infra* note 150.

<sup>132</sup> Not surprisingly, the people who are affected by the takings usually are in the lower classes. As a result, they are less knowledgeable about their rights and are less likely to challenge a government’s taking power and its designation of blight. Consequently, these abuses are not recorded and not published in any legal documents. See Boudreaux, *supra* note 18, at 20–21 (“Many exercises of eminent domain never end up in reported court opinions. After all, one of the perceived problems of eminent domain is that it is often used against the poor and politically unsophisticated, who are often unable to mount a legal challenge.”).

<sup>133</sup> *Norwood v. Horney*, 830 N.E.2d 381, 384 (Ohio Ct. App. 2005) Norwood is its own municipality and is not a section of Cincinnati.

prospered because of its "healthy industrial base."<sup>134</sup> After being seemingly resistant to the fluctuations of the economy, specifically those that devastated the auto industry,<sup>135</sup> Norwood's future seemed abysmal after several large employers left the area.<sup>136</sup> To avoid the fate of so many towns that have essentially run themselves into the ground after the loss of major businesses, Norwood decided that it must react.<sup>137</sup> To do this, Norwood "used the legal weapon of eminent domain in its attempt to reinvent itself" and "[to] help crawl out of its fiscal hole."<sup>138</sup>

To make way for the "Rookwood Exchange," a mixed-use development providing both retail and office space, Norwood initiated the appropriation process.<sup>139</sup> The only way for Norwood to appropriate the owners' property was if the area was designated as blighted, or, in this particular case, the area is a "slum, blighted, deteriorated . . . or deteriorating."<sup>140</sup> Norwood hired an independent consulting firm to conduct a study to determine whether the area met these standards; the firm subsequently found several negative sides to the proposed renewal area.<sup>141</sup> Basing its decision on the firm's conclusions, the

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<sup>134</sup> *Id.* at 384 (Such large businesses that have provided jobs and taxes have been General Motors and LeBlond Machine Tool Company).

<sup>135</sup> John Gibeaut, *Taking Control: The Eminent Domain Controversy Finds a Battlefield in the Development of a Cincinnati Suburb*, 91 A.B.A. J. 44 (Dec. 2005) (describing the effects of General Motors' closing of their plants and the dispute in the *Horney* case).

<sup>136</sup> *Id.* at 45 (noting that the plant's closing cost Norwood over 4,000 jobs and thirty-five percent of the city's tax base).

<sup>137</sup> *Horney*, 830 N.E.2d at 386. Although Norwood tried many remedies, in this case it passed Ordinance No. 56-2003 "authorizing the mayor to contract with Rookwood [a private development firm] for the redevelopment of the area." *Id.*

<sup>138</sup> Gibeaut, *supra* note 135, at 45. It comes as no surprise that the properties being taken are owned by low- to middle-class individuals with little political clout. However, these property owners have successfully campaigned enough that this decision has become a nationally recognized case. See Motoko Rich, *The Buyouts Versus the Holdouts*, N.Y. TIMES, June 30, 2005, at F1 (describing current governmental attempts to take property for private development by abusing the definition of blight. In each attempt the lower classes are being systematically removed while the wealthy developers and future affluent tenants are the ones that stand to benefit.).

<sup>139</sup> *Horney*, 830 N.E.2d. at 384-85. Not surprisingly, the development was first conceived by a private development firm, Rookwood Partners, Ltd. To acquire the land for the development, Rookwood purchased the land from the majority of the landowners. However, there were some holdouts that would not agree to sell. Consequently, Rookwood approached Norwood's city council to obtain the land through its taking power. Norwood agreed. *Id.*

<sup>140</sup> NORWOOD, OHIO CODE § 163.02 (2006).

<sup>141</sup> *Horney*, 830 N.E.2d. at 385. The study did not claim that the area was blighted or a slum. It found that there was future blight. To make this designation, the firm concluded that the area's best use was not for single or two family residences, that

City Council of Norwood passed an emergency ordinance and later a resolution to take the holdout owners' property.<sup>142</sup> The property owners asserted that Norwood's exercise of its taking power violated Ohio's Constitution and that Norwood abused its discretion in determining that the condemned area was "deteriorating."<sup>143</sup> The trial court ruled in favor of Norwood.<sup>144</sup>

The reviewing court upheld the trial court and explained that "[w]here the designation of an area as 'blighted' indicates that there is a sound reasoning process by which it has been declared 'blighted,' and the resulting condemnation is for the purpose of eliminating that blight, the constitutional basis for the use of eminent domain exists."<sup>145</sup> Among its reasons to uphold the trial court, the court found that there was sound reasoning to consider the area deteriorating based on 1) the safety issues of two streets with dead-ends and 2) "the negative impact on the quality of residential living in the area at night resulting from the lights from adjacent developments."<sup>146</sup> Nevertheless, even though the purpose was not for eliminating blight, but rather for providing space for a private development firm to build its mixed-use development, the appellate court affirmed the trial court because there was no abuse of discretion.<sup>147</sup> This decision put Ohio citizens on notice that any

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piecemeal development would have an adverse effect on the community, and the fact that other owners sold their property indicated that other development would occur. This is clearly not the way "blight" was defined by the legislature. The firm's reasoning falls on the term "best use" and, as a result, its analysis is entirely inappropriate. The use of blight was meant to remove only the worst areas, not the areas that could be improved because they do not meet the term "best use."

<sup>142</sup> *Horney*, 830 N.E.2d at 384–85. It must not be ignored as a possibility that the Council based its decision on the pressure placed on them by Rookwood Partners, Ltd.

<sup>143</sup> *Id.* at 388 (Defendants, in assigning error to the court, asserted that the area did not meet the definition of a deteriorating area in accordance with Norwood City Code Section 163.02.).

<sup>144</sup> *Id.* at 394 ("Because Norwood retained ultimate control over the decision to use its eminent-domain powers," the court affirmed the trial court.).

<sup>145</sup> *Id.* at 388 (citing *AAAA Enterprises, Inc. v. River Place Cmty. Urban Redevelopment Corp.*, 553 N.E.2d 597 (Ohio 1990)).

<sup>146</sup> *Id.* at 390. Almost comically, the council justified the condemnation by the negative effect that only the holdouts would experience to justify the necessity for removing them. This reasoning begs the question. If the lighting caused such a drop in quality of residential living then why are the property owners still trying to remain? After all, the court never stated that there was evidence that the renewal area was a danger to the residents or that the buildings were a threat to the community's general health, safety, or morals. Lastly, and most notably, it was Rookwood's development that caused these problems.

<sup>147</sup> *Id.* (holding that Norwood "had discretion to conclude that the unique combination of factors present in the urban renewal area was detrimental to the public health, safety, morals and general welfare and that the area would deteriorate, or was in

property owner who lives in either a one-or two-bedroom residence or lives in a cul-de-sac has a chance that the government will swallow her property under its taking power.

In July, 2006, the Ohio Supreme Court held in favor of the homeowners for several reasons.<sup>148</sup> First, the court ruled that portions of Ohio's definition of blight were unconstitutional under the void-for-vagueness doctrine.<sup>149</sup> The court paid particular attention to the terms "deteriorating area" and "diversity of ownership."<sup>150</sup> Second, it held that courts shall apply heightened scrutiny in reviewing statutes regulating eminent domain powers.<sup>151</sup> This case received a large amount of national attention and was hailed as a win against the recent threat of eminent domain takings.

Many other examples of governments' abuse of eminent domain power and the definition of blight permeate across the country. In a somewhat surprising move, the City of Ardmore, Pennsylvania has designated a large section of its central business area as blighted.<sup>152</sup> Among the retail stores which are being condemned are two high-end stores: one that sells cappuccinos and another tailoring store where the merchandise can cost as high as \$6000 for a suit.<sup>153</sup> Ardmore is planning on replacing this area by creating an upscale urban village.<sup>154</sup>

Due to the demand for a nearby resort town from wealthy New Yorkers, the local government in Long Branch, New Jersey has devised a way to attract this crowd.<sup>155</sup> Spurred on by the influence of a local developer,<sup>156</sup> the

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danger of deteriorating, into a blighted area") (internal citations and parentheticals omitted).

<sup>148</sup> *Norwood v. Horney*, 853 N.E.2d 1115, 1123 (Ohio 2006).

<sup>149</sup> *Id.* at 1145 ("Rather than affording fair notice to the property owner, the Norwood Code merely recites a host of subjective factors that invite ad hoc and selective enforcement.").

<sup>150</sup> *Id.* at 1144–1146 (holding that "diversity of ownership" is not defined and using the term "deteriorating area" is inappropriate because it is too speculative).

<sup>151</sup> *Id.* at 1123.

<sup>152</sup> Matthew P. Blanchard, *Ardmore Tailors the Concept of Blight*, PHIL. INQUIRER, July 31, 2004, at A01 (reporting that government officials are calling this ten block area "an area in need of revitalization").

<sup>153</sup> *Id.* The majority of the renewal area is comprised of lower-end stores. Therefore, although this example does show that the affluent may be affected, on the whole, the poorer classes are the ones who are most affected.

<sup>154</sup> *Id.* (The plan would be composed of six projects, intending to create 90,000 square feet of retail space, 150 apartments and 670 parking spaces.).

<sup>155</sup> Jonathan V. Last, *Razing New Jersey: In Which Developers in League with City Hall Come Up with a Curious Definition of "Blight,"* WKLY. STANDARD, Feb. 13, 2006, at 27 (explaining that, although the use of eminent domain in Long Branch "may look like a success story, it is actually a cautionary tale").



city appropriated property<sup>157</sup> and sold the parcels it acquired to the developer at below-market value.<sup>158</sup> Despite promises to build one large, mixed-use development,<sup>159</sup> the developer razed smaller homes only to build larger single-family residences in Phase I of its plan.<sup>160</sup> Despite reassurances from the local government that their homes would be safe, after the remaining local residents foresaw what was happening, they protested and signed petitions to prevent Phase II of the condemnations.<sup>161</sup> Long Branch, as it later turned out, never intended to build around the homes which it promised would not be taken.<sup>162</sup> Therefore, to make room for 185 more condominiums for Phase II, the city then designated the remaining ocean front homes as blighted to solidify its position.<sup>163</sup> These homes were described as “neat bungalows and ranch houses with solid roofs . . . [with] carefully tended lawns, and flowerpots on porches” and “big, beautiful houses facing the ocean, with nothing between them and the beach except wide, rolling lawns. They would not look out of place in a Homer painting.”<sup>164</sup>

In Riviera Beach, Florida, the town is designating as blighted more than 2000 houses, occupied by 6000 residents, to allow private development.<sup>165</sup>

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<sup>156</sup> *Id.* Not too surprisingly, the developer was later sentenced to prison for making \$115,000 in payoffs to local officials in a nearby county for a similar type of development. *Id.* at 29.

<sup>157</sup> Jason George, *Testing the Boundaries of Eminent Domain: Long Branch Wants to Seize Old Homes to Make Room for New Ones*, N.Y. TIMES, Mar. 31, 2004, at B1 (In the first phase, Long Branch condemned without needing to designate the property as blighted).

<sup>158</sup> Last, *supra* note 155, at 28 (explaining that most of these homeowners went quietly believing that the developers’ threat that “[t]he holdouts will be losers” would come to fruition).

<sup>159</sup> *Id.* The proposed plan purported to have bike paths and high-end retail establishments. *Id.*

<sup>160</sup> *Id.* at 29 (“The developers built not the glorious, integrated residences imagined by the master plan, but a series of bland, cookie-cutter condos and townhouses.”).

<sup>161</sup> *Id.* at 30. The managing partner of the law firm given the contract to fight these appropriation proceedings by the city was found to be on the board of the development firm.

<sup>162</sup> *Id.* The mayor later blamed the property owners for not retaining attorneys. *Id.*

<sup>163</sup> Ronald Smothers, *In Long Branch, No Olive Branches*, N.Y. TIMES, Oct. 16, 2005, at 14NJ, Page 6 (noting that the city for the last ten years has denied all building permits to the citizens trying to revamp the houses that the city later designated as blighted); Last, *supra* note 155, at 30 (“The irony, of course, is that the [condemned] neighborhood is one of the few sections of Long Branch that isn’t blighted.”).

<sup>164</sup> Last, *supra* note 155, at 30 (internal citations omitted).

<sup>165</sup> Robert Cassidy, *Eminent Domain Revisited*, BUILDING DESIGN AND CONSTRUCTION, Jan. 1, 2006, at 7 (noting that those affected comprise nearly one-fifth of the residents of Riviera Beach).

Many of these homes are owned by African-Americans.<sup>166</sup> The project's plan, costing over 1.25 billion taxpayer dollars,<sup>167</sup> is to construct luxurious high-rise condominiums with waterfront yachting, large houses, and shops.<sup>168</sup> This dispute has not reached the trial court level yet, but it is typical of a wealthy, well-connected developer forcing government to use eminent domain to expel minorities and the poor.

## VI. PROPOSING A STATUTORY DEFINITION OF BLIGHT

Communities should be given a definition of blight that is specially crafted to serve two purposes. First, it must be tailored to allow genuinely blighted property to be condemned.<sup>169</sup> Second, it cannot be vague and malleable enough for developers and government officials to use the definition to acquire property that could not be purchased under normal market conditions. This means that the definition must be general enough that it fits the type of properties that it was intended to legitimately condemn but narrow enough that it cannot be manipulated. Thus, the only buildings that will be razed under the government's eminent domain power are those that truly meet the requirements for the definition of blight and that create a real problem for a community's health and welfare. This should only occur if the statutes are clear, specific, and quantifiable.

### *A. The State Statutes Defining Blight Must Have Certain Elements for an Effective Protection Against Local Governments*

In order to draft an effective definition of blight, there are several across-the-board changes to these statutes that must be addressed. First, the definition must be constructed to be as objective as possible. Currently, every statute suffers from extremely subjective elements in its definition.<sup>170</sup> By altering the definition of blight to be more objective, the definition will not be nearly as malleable as the law currently stands, and the developers and government officials will have a more difficult time designating a property as

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<sup>166</sup> *Id.* This is yet another example of minorities feeling the greatest negative impact of this type of appropriation.

<sup>167</sup> Christian M. Orme, *Kelo v. New London: An Opportunity Lost to Rehabilitate the Takings Clause*, 6 NEV. L.J. 272, 273 (2005) (describing the significance of, and proposing a better framework for, analyzing the Takings Clause).

<sup>168</sup> Dennis Cauchon, *Pushing the Limits of 'Public Use,'* USA TODAY, Apr. 1, 2004, at 03A; Robert Cassidy, *Eminent Domain Revisited*, BUILDING DESIGN AND CONSTRUCTION, Jan. 1, 2006, at 7.

<sup>169</sup> Every statute allows for local governments to condemn property that truly is blighted. The difficulty is finding a definition that meets the second requirement.

<sup>170</sup> See, e.g., *infra* note 173 (discussing the term "diversity of ownership").

blighted. Second, the area to be designated as blighted must meet certain strict requirements. For example, for a neighborhood to be blighted, the statute must require that a majority of the structures are blighted. Thus, a city cannot blight a neighborhood if only 10–15% of homes are blighted.<sup>171</sup> Another requirement is that the blighted property must be deemed an objective threat to public safety. For a local government to cite this threat, it must point to specific factors. For instance, the neighborhood must meet a measured risk of fire, disease or other health-related factors. Also, the property could be in violation of building codes for an extended period of time.<sup>172</sup> Third, the property must stymie the growth of the community. This determination must be made by quantifiable factors, such as the fair market value of the neighboring land or an overwhelming tax deficiency<sup>173</sup> for an extended period of time. The use of the land cannot merely be deemed an “inefficient”<sup>174</sup> use of the land. Property owners must be allowed leniency to use the land as they see fit. The reasoning goes that if a property owner wants to use his land for a personal residence, provided the land has been zoned appropriately, the government cannot blight his property because a retail store would be a more efficient use of the land. Therefore, the property must be considered as sufficiently unusable.

The state statutes should provide for time to allow the property owners to rehabilitate their properties.<sup>175</sup> If a government deems a property blighted, it must allow the property owner an ample amount of time to make the necessary changes to improve the property. Moreover, if a government designates a property or neighborhood as blighted, this designation must have a statute of limitations. Governments have designated property as blighted and then, ten years later, used that designation, despite whatever improvements have been made by the owners, as justification for taking the property.<sup>176</sup> Finally, the statutes must be specific enough in detailing what or how many requirements must be met before a local government may

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<sup>171</sup> Colleen Greer, *Senate Approves Piccola's Landmark Eminent Domain Reform*, PR NEWswire, Dec. 7, 2005, [www.prnewswire.com](http://www.prnewswire.com) (last visited Feb. 13, 2007).

<sup>172</sup> This does not mean that a property owner can keep a building in violation of a building code while tenants are living in the building. He must vacate the property and prove to the officials that he intends to make all necessary improvements.

<sup>173</sup> See, e.g., ARIZ. REV. STAT. ANN. § 36-14712(f) (2006) (providing “tax or special assessment delinquency exceeding the fair value of the land”).

<sup>174</sup> See, e.g., MICH. COMP. LAWS ANN. § 125.72 (West 1997) (listing factors considered when declaring a “blighted area”).

<sup>175</sup> See, e.g., DEL. CODE ANN. tit. 31, § 4501 (2005). This statute effectively includes a rehabilitation clause. *Id.*

<sup>176</sup> See *supra* note 161 (discussing abuse of eminent domain powers in Long Branch, N.J.).

designate a property as blighted. They should not be open-ended like so many statutes currently enacted.<sup>177</sup>

*B. To Prevent the Same Pitfalls as the Recently Enacted Statutes, the State Statutes Defining Blight Must Not Have Certain Elements*

These new statutes must refrain from several elements present in the existing definitions of blight. First, the statute must not contain a provision allowing the local government to deem a property blighted because there might be future blight.<sup>178</sup> Local officials are not soothsayers; they cannot predict the future. To use an analogy, this scenario is similar to a sports team cutting a player not because he is playing poorly at the moment, but because his skills will diminish in the future. The Ohio Supreme Court recently stated that “government does not have the authority to appropriate private property based on mere belief, supposition, or speculation that the property may pose such a threat in the future.”<sup>179</sup> In addition, property owners have an economic incentive to maintain their property above a blight standard. Therefore, more times than not, a property owner will make the necessary changes to his property before it can be considered blighted. Second, a state’s blight statute must eliminate all subjective factors from its language, such as “diversity of ownership,”<sup>180</sup> “inadequate street layouts,”<sup>181</sup> “unusual conditions of title rendering the title non marketable,”<sup>182</sup> and “[u]ndeveloped vacant land.”<sup>183</sup> In practice, these phrases cannot provide owners with proper notice of how to

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<sup>177</sup> See, e.g., LA. REV. STAT. ANN. § 33:4720-71 (2005) (failing to mandate a certain number of factors that must be met to determine whether property is designated as blighted).

<sup>178</sup> See OHIO REV. CODE ANN. § 303.26(E) (West 2005) (defining blight). In Ohio, city officials have tried to take property because it is at risk for future blight. *Norwood v. Horney*, 830 N.E.2d 381, 385–86 (Ohio Ct. App. 2005).

<sup>179</sup> *Norwood v. Horney*, 830 N.E.2d 1115, 1145 (Ohio 2006).

<sup>180</sup> See, e.g., GA. CODE ANN. § 8-4-3(1)(B)(v) (2006).

<sup>181</sup> See *Horney*, 830 N.E.2d at 389. This language has been used to condemn a neighborhood merely because it is in a cul-de-sac. *Id.* The government argued that a cul-de-sac is inefficient because one cannot drive through it. *Id.*

<sup>182</sup> See COLO. REV. STAT. ANN. § 31-25-103(2)(g) (2005). The property owner should be entitled to decide whether or not to maintain his unmarketable property. After all, it is his decision whether to tear down the property or continue to inhabit or own it.

<sup>183</sup> See, e.g., ME. REV. STAT. ANN. tit. 30-A, § 5101(2)(C) (2006) (punishing a property owner for choosing not to invest more money in his land). A property owner should not be charged with a duty to invest more money in his land. If he so decides to purchase the land only to hold it, allow it to appreciate, and sell in the future, that should be his choice. See DE SOTO, *supra* note 26.

maintain their property. Rather, the phrases are so malleable they can only be used by governments to justify a condemnation.<sup>184</sup>

### *C. The Proposed Statutory Definition of Blight*

As stated above, the proposed statute must be narrow enough so that local officials may not abuse the definition of blight and it must be general enough so that the truly blighted property may be condemned. To find such common ground, the statute must avoid the same pitfalls of past statutes but it must preserve the essential elements necessary to provide adequate protection for property owners. This Note proposes the following definition of blight:

A “blighted area” is characterized by any of the following:

(A) currently unusable and/or abandoned property that is a severe threat to the safety, health, morals, and welfare of the community, endangering life by fire, severe crime, severe disease, and/or other severely unsafe or unsanitary conditions, or;

(1) for provision (A) to be satisfied, one of the following requirements must be met:

a) the majority of the buildings are currently in violation(s) of state building codes, for a period of at least six months, as determined by local health and safety boards that would normally constitute grounds for evacuation or (a non-*eminent domain*) condemnation;

b) agreement of over 2/3 of the neighboring residents, excluding those individuals that could acquire the property within three years of the vote;

c) a significantly disproportionate expenditure of public funds for public health and safety, crime prevention, correction, and prosecution;

(B) property that meets one of the following conditions:

(1) has been a substantial retardant of appreciation for the neighboring community for over five years as a result of structures that are

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<sup>184</sup> See *Horney*, 830 N.E.2d at 390 (holding that it was not an abuse of discretion for government officials to declare that a dead-end street could be considered blight because it was an inefficient street layout).

dilapidated or deteriorated but not because they are merely an inefficient productive use of the property;

(2) tax or special assessment delinquency exceeding the fair value of the land;

(C) the blighted area must contain at least a majority of structures designated as blight;

(D) after the property has been designated blighted, local government shall provide a waiting period of one year to allow the property owner to rehabilitate the property;

(E) Any designation of blight is effective for two years, unless the property owner has challenged the designation. If this period of time has lapsed, the agency vested with blight-designating powers must reevaluate and reassess the subject property, otherwise the property is not deemed blighted. No deference shall be given to the prior designation;

(F) The definitions in this section are as follows:

(1) currently: at the moment of the designation, allowing nothing to be considered of the future;

(2) neighboring residents: property owners located within  $\frac{1}{4}$  mile from the subject property;

(3) substantial: having an impact of over 30% of potential growth as determined by three appraisers.

## VII. CONCLUSION

Generally, the largest investment property owners make is the purchase of their home.<sup>185</sup> As a result, a large portion of their wages will go towards paying taxes and mortgages on their home. The Framers understood that the government's limited ability to take one's home was important to preserve

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<sup>185</sup> Rob Rueteman, *Economic Storm Clouds Gathering*, SCRIPPS HOWARD NEWS SERV., Mar. 6, 2006 ("[T]here are ample indications that many people feel wealthier because of [sic] soaring value of their homes, which for many Americans is the largest investment they own.").

liberty and to ensure that people will work hard to maintain their home.<sup>186</sup> Therefore, local governments should not be able to find loopholes in the law, as they have done in the past with loosely-defined blight statutes, to take these homes and transfer them to other, wealthier individuals. For these reasons, it is necessary to close this loophole in the law by creating a tight, restrictive, and objective definition of blight.

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<sup>186</sup> See *Walters v. Nat'l Ass'n. of Radiation Survivors*, 473 U.S. 305, 370 n.18 (1985) (Stevens, J., dissenting).

